BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	
Northside Sanitary Landfill, Inc.	RCRA Appeal No. 84-4
Docket No. IND050530872	

ORDER ON RECONSIDERATION

On April 19, 1985, Northside Sanitary Landfill, Inc. (Petitioner) moved for reconsideration of the Administrator's Order Denying Review dated April 3, 1985.

The Order Denying Review correctly concluded that the issue raised by Petitioner should not be reviewed under 40 CFR §124.19. Nevertheless, reconsideration is warranted to revise and clarify the legal basis for the denial of review and to respond to Petitioner's claims that it has been denied the opportunity for a hearing.

In the original petition filed under 40 CFR §124.19 (1984), Petitioner requested review of EPA Region V's "response to comments" issued in conjunction with the denial of Petitioner's final RCRA permit.[1/] Petitioner requested review for the pur-

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1/ Letter (petition), dated November 8, 1984, from John W. Bankert, Sr., President, Northside Sanitary Landfill, Inc.

pose of having the response to comments restated "to correctly reflect that the 'Old Farm Area' is not included in Northside's Interim Part A Permit, and hence should not be subsequently referenced in a Closure Procedure . . . . No reference to the 'Old Farm Area' was made in the Part A Interim Permit and/or Application." Petitioner twice stated, however, that it was not objecting to EPA's final decision to deny the permit. EPA Region V responded to the petition and urged denial of review on the grounds that (i) Petitioner is not entitled to have the permit decision reviewed since it is not contesting the denial of the permit, and (ii) the Old Farm Area should be subject to the closure requirement because Petitioner, in its RCRA Part A permit application, clearly delineated its hazardous waste facility, on diagrams and an aerial photograph, as including the Old Farm Area.[2/] Petitioner responded, arguing that (i) EPA's finding regarding the Old Farm Area is subject to review under 40 CFR §124.19; and (ii) Region V "has argued 'out of context' the hand-drawn map . . . and the photograph contained in Northside's hazardous waste permit application of November 25, 1980."[3/]

As the issue was thus framed by the parties' submissions on appeal, there appeared to be a dispute over the location of the facility's boundaries, that is, did the Old Farm Area fall

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2/ EPA Region V Response, filed January 11, 1985.

3/ Petitioner's Response to Region V's Response, dated January 22, 1985.

within the boundaries of the facility? EPA argued that it did and Petitioner argued that it did not. Both parties appeared to assume that inclusion would mean that the Old Farm Area had to be closed in accordance with the RCRA requirements governing closure of hazardous waste facilities. Petitioner opposed such a result, contending that no hazardous waste activities took place at the Old Farm Area, and, therefore, according to Petitioner, closure of that area should not be required. Region V, on the other hand, favored closure irrespective of the presence or absence of these activities, for it took the position that closure must be effected throughout the entire facility unless the hazardous waste portions were segregated from adjacent non-hazardous waste portions -- which they were not, according to Region V.

In my April 3, 1985 Order Denying Review, I held that the issue of the facility's boundaries was reviewable but I denied review on the grounds that Petitioner did not sustain its burden of showing that the Region's permit determination was clearly erroneous or otherwise subject to review. In ruling that the issue of the facility's boundaries was reviewable, I made the following observation regarding the importance of the issue raised by the parties:

> I agree with petitioner that it has raised an issue which is reviewable under §124.19. The location and dimensions of a hazardous waste facility are probably two of the most rudimentary pieces of information that go into a proper permit decision. If the permit decision does not identify where the facility is located, or how big it is, the permit decision cannot be implemented successfully

> regardless of the outcome of the decision. This is particularly apparent in the present case, for either including or excluding the Old Farm Area will significantly alter the area of Petitioner's landfill that is subject to the closure and post-closure requirements of the regulations, 40 CFR Part 265 (Subpart G). Therefore, even though Petitioner has stated that it does not object to the denial of its permit, I am persuaded that the matter which Petitioner is raising is such an integral part of the permit decision that it is the kind of matter which can be reviewed under §124.19. [Footnote omitted.] .4/

On reconsideration of the April 3 Order, it appears that the foregoing language is being construed by the parties to mean or imply that Region V had the authority to determine the scope of closure procedures during the course of the permit denial proceedings. Any such construction of this language is in error in the context of this case because Indiana had been granted the authority to make the closure determination pursuant to §3006 of RCRA, a fact that was not brought to light in the parties' original submissions. Sections 3006(b) and (c) provide that when a qualified state receives authorization the federal program is suspended and the hazardous waste program operates under state law. In this instance, Indiana received a so-called Phase I authorization on August 18, 1982, which gave the state the necessary authority to approve the closure plan of any facility whose permit application has been denied by EPA. See 40 CFR §271.128(e)(2). Under a Phase I authorization EPA retains the authority to issue permits 5/ and, therefore, was

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4/ Order at 2-3.

5/ See 40 CFR §270.1(c).

the proper authority to issue the permit denial. However, because of the Phase I authorization, EPA was not the proper authority to decide which areas of the facility should close -- Indiana was. Consequently, to the extent that Region V's response to comments purports to make findings regarding whether or not the Old Farm Area must be closed, those findings are without legal effect, for any such findings are for Indiana to make pursuant to its Phase I authorization.

Also, on reconsideration of the April 3 Order, I conclude that it wrongly implies that any area that is part of the facility for permitting purposes must automatically be closed if the permit for the facility is denied. Any such implication is in error because it would ignore the crucial distinction between permit determinations, which decide whether and under what conditions waste may be managed on the property, and closure determinations, which are concerned with which areas were used for hazardous waste management and what specific technical requirements, such as cover or maintenance requirements, should apply to those areas. In the case of permit determinations, the geographic area of the "facility" is not limited to the areas of the property where hazardous wastes are currently managed but rather include all contiguous property under the owner or operator's control. The property boundary of this area defines the area where the owner or operator is authorized to treat, store or dispose of hazardous waste; and it represents the broadest extent of EPA's jurisdiction under sections 3005(a)

and (e) of RCRA. See 47 Fed. Reg. 32288-89 (July 26, 1982); 50 Fed. Reg. 28712 (July 15, 1985). Closure determinations, in contrast, are likely to be more limited in geographic scope, since they are concerned with the areas within the boundaries of a facility that are actually used for hazardous waste management, thus ensuring that any hazardous waste remaining after closure does not pose a threat to human health or the environment. See 40 CFR §265.111. Accordingly, the closure regulations in general only burden areas of the facility where treatment, storage, or disposal operations took place after November 19, 1980, i.e., the date EPA's closure regulations took effect. See 45 Fed. Reg. 33,170, 33,197 (May 19, 1980). Consequently, identifying the boundaries of a facility for purposes of a permit denial does not necessarily define the areas of a facility that must be closed pursuant to a closure plan. 6/

In view of the foregoing, Petitioner's claim that it has been denied an adequate hearing on the closure determination must be rejected. Indiana, not EPA, has the authority to approve Petitioner's closure plan, including the responsibility to

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6/ Although EPA's closure regulations refer to closure of the "facility," see, e.g., 40 CFR §§255.111, 265.112, the more specific references to individual types of units, such as waste piles and landfills, make it clear that closure was meant to apply only to the areas that are actually used for hazardous waste management. 40 CFR 265 (Subpart L -- waste piles) and (Subpart N -- landfills). The preamble to these regulations confirms that the specific requirements were generally meant to apply only to areas of actual use. See 45 Fed. Reg. 33,170-171 (May 19, 1980). Hence, "facility" in the context of closure refers to the land, structures, and other property and equip-

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decide which areas of the facility have to comply with specific closure requirements such as the requirement for a final cover. Because state law has superseded the federal closure requirements, 40 CFR Part 265 (Subpart G), the closure proceedings will take place under the procedures established by the Indiana regulations corresponding to the federal requirements, [7/] and the closure plan must comply with the standards set out in Indiana law. Petitioner will therefore have the opportunity to present its arguments to the state. The Region's statement that the Old Farm Area must close cannot be viewed as a final action imposing closure obligations on Petitioner, for the statement is without legal effect as previously stated. [8/]

(Footnote No. 6 cont'd)

ment used for hazardous waste management, not to the fullest extent of EPA's statutory jurisdiction under sections 3004 and 3005 of RCRA. See 40 CFR §260.10.

7/ The federal regulations contemplate that closure requirements for a facility will be determined separately, after the permit denial proceedings have been completed, 40 CFR §265.112 (c)(1). The owner or operator has the opportunity for comment and possibly a hearing before adoption of any final closure plan, 40 CFR §265.112(d).

8/ At most, the Region's response in this case informed the applicant and interested parties of EPA's opinion on an issue raised at the public hearing on Petitioner's permit denial. Furthermore, there is no reason to suppose, as Petitioner appears to, that EPA's finding will preclude the state from making its own finding based on the evidence submitted to it. It is well settled that an administrative agency's factual determination provides a basis for collateral estoppel only if the agency is acting in a judicial capacity and reaches a final determination

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Granting Petitioner an additional hearing in a federal administrative forum would not only call the state's authority into question -- by requiring EPA to decide a state law matter -- but would also undoubtedly duplicate the efforts of state officials. Inasmuch as Petitioner does not challenge its permit denial but wishes only to be heard on the issue of its closure obligations, no purpose would be served by the submission of such evidence in a federal rather than a state proceeding. Indeed, Petitioner admits that some of the information it wishes to submit to EPA has already been submitted in state proceedings. The state administrative agency therefore provides the proper forum for resolving questions about Petitioner's closure obligations. 9/

For the reasons stated, the April 3, 1985 Order Denying Review is revised and clarified as follows: Region V's findings

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(Footnote No. 8 cont'd)

of an issue properly before it, when the parties have fair opportunity to litigate the issue and to obtain judicial review. See, e.g., United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966); Bowen v. United States, 570 F.2d 1311 (7th Cir. 1978). As these principles reveal, Petitioner's fears that the Region has usurped the state's authority are groundless. Here, there was no formal hearing: the Region made its statement in response to a comment made at an informal public hearing. The Region's finding relates to an issue which is properly before the state, not EPA, and which is not reviewable as part of EPA's permit decision. The state is free to exercise its regulatory authority.

9/ When a state has been authorized to administer some but not all of the hazardous waste management program, EPA should attempt to organize administrative procedures so as to avoid conflict with state decisionmaking authority and minimize duplication and overlap as much as possible.

respecting closure of the Old Farm Area, which are set forth in the Region's "response to comments" accompanying the denial of Petitioner's permit, are without legal effect, for Indiana, not EPA, is the proper authority to make closure determinations respecting Petitioner's facility, including approval or disapproval of Petitioner's closure plan. Therefore, no purpose would be served by granting Petitioner's request for a hearing. In all other respects, the Order Denying Review is affirmed and the petition for review is denied.

So ordered.

Lee M. Thomas
Administrator

Dated: NOV 27 1985

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order On Reconsideration in the matter of Northside Sanitary Landfill, Inc., RCRA Appeal No. 84-4, were mailed to the following:

By 1st class mail, postage prepaid:

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Dated: NOV 27 1985